

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77 - 1034

B  
P/S

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
-against-  
PASQUALE PICCIRILLO,  
Defendant-Appellant.

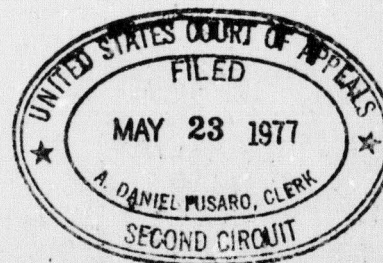
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P/S

ON APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF THE DEFENDANT-APPELLANT

Docket No. 77-1034  
Docket No. 77-1040

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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REPLY BRIEF OF DEFENDANT-APPELLANT

After a recitation of facts that doesn't differ materially from those recited by the appellant's brief - which shows entrapment by the direct participation by the government's own confidential informer, and later coercion by both the informer and Special Agent John Pitta acting as a 'strong-arm man', the government on page 18 of its answering brief addresses itself to the questions of law raised by appellant's brief.

That the government did not produce its participating confidential informer is labelled as a claim "wholly without merit" in the face of *United States v. Bueno*, 441 F.2d 903 (5th Cir. 1971). By misconstruing *Hampton v. U.S.* 96 S. Ct. 1646, decided April, 1976, as controlling and overruling the *Bueno* case, and also citing *United States v. Neal* and *United States v. Russell*, the government very conveniently rests its contentions without any further explanations.

Lest the *Hampton* case be misinterpreted as to the principles



involved - there "The defendant Hampton was not enticed into participation in the criminal activity. According to the government's case, HE solicited the informer telling him that he, Hampton, needed money and knew where he could get heroin. The informer responded that he could find a buyer; and when Hampton suggested that 'he get in touch with those people' the informer then called a government agent who arranged for a sale. The sale took place between the defendant and two agents posing as narcotic dealers. An agreement for a second sale was made, and after that sale was consummated, the defendant was placed under arrest." (Emphasis Supplied)

(See New York Law Journal - Thursday, October 14, 1976 - ENTRAPMENT - APPLICABILITY AND SCOPE - By the Hon. Howard E. Goldfluss, Acting State Supreme Court Justice and an adjunct associate professor of criminology at Fordham University (Pages 1 & 3) at page 3, column 3 under the heading NO ENTRAPMENT)

The defendant, Hampton, "conceded that he approached the informer indicating that he was short of cash" (Emphasis Supplied) (New York Law Journal, supra, at page 3, column 3) and therefore it was the defendant, Hampton, who was the party that initiated and solicited the government agents to participate in his scheme.

Consequently, the argument in the Hampton case was addressed to the effect that government participation in an illegal scheme barred prosecution notwithstanding the predisposition and proclivity of the defendant, Hampton, to engage in such activity.

The Hampton case is not a parallel case and has no relation to the facts in the instant appeal. In the case against the defendant Piccirillo no predisposition to sell guns was established (Exhibit A - T.15)



nor did the defendant Piccirillo seek out and solicit the government's confidential informer or special agents. They came to his house, befriended him, badgered him, cajoled him, coerced him, to induce him to obtain guns; and the record is replete with proof that the government's own agent was directly involved and participated in each and every transaction involving the alleged sales.

The failure, therefore, to produce this confidential informer was fatal to the government's case under the principles of *United States v. Buono*, supra, and *United States v. Gomez-Rejas*, 507 F.2d 1213 (1975).

REGARDING POINT VI OF THE GOVERNMENT'S BRIEF

Implicitly the government concedes that the defendant was entitled to a charge that the jury could draw the inference that the testimony of the confidential informer would have been adverse to the government if little or no effort were made by the government to produce the witness under its control - when it states: "However, the record clearly reveals that Piccirillo was not entitled to this charge because both the defense and the Government made substantial efforts to locate the informant and could not do so."

That the government did not make such effort is clear on the record (Exhibit B - T. 190, 191, 192 & 305). On page 192, line 11 of the trial transcript we have the following testimony:

"THE COURT: Is he going to testify?

MR. APPLEBY: No, your honor."

On page 305, line 12 of the trial transcript we have the following testimony:



"Q Do you think the Government will not utilize him as a witness?

A I have no knowledge of that.

MR. APPLEBY: I can tell you he's not going to be called as a witness.

Q Don't you think based on your communications with Frank Sogliosso that he would be essential as a witness in a case like this?

A No.

Q Wouldn't he give you the background information to establish predisposition?

A By the undercover's conversation with the people, their admissions to him, we proved predisposition by their conversation, Special Agent's conversation."

(Emphasis Supplied by Assistant United States Attorney Richard Appleby)

As soon as counsel was retained to represent the defendant Piccirillo on or before September 14, 1976 a personal visit was made by counsel to the office of Assistant United States Attorney Richard Appleby, and the latter was informed that the defendant Piccirillo would rely on the defense of entrapment. Request was made by counsel to obtain the presence of the confidential informer as a witness for defendant's trial, but to no avail. The said Assistant United States Attorney refused to divulge the name and address of the confidential informer until he was ordered to do so on the first day of trial by Judge Platt (T. 53), and he stated both on and off the record until the trial was coming to a close that the government will not call the confidential informer as a witness.



The defense later learned that only 10 days before trial the confidential informer, Frank Soglioso, had been paid by the government (Exhibit C - T. 299, 300 & 301).

On the last day of the trial, November 16, 1976, the said Assistant United States Attorney reverses himself and has Special Agent Arnold Cole testify that he made an effort to subpoena the confidential informer as a witness for the government. He admits under cross-examination that only on the preceding day, November 15, 1976, the said United States Attorney instructed him to locate Frank Soglioso, the confidential informer. (Exhibit D - Supplemental T. 12, 13, 14, 15 & 16). - so that the said Assistant United States Attorney misstates facts when he states on page 20 of the government's brief that "the Government made substantial efforts to locate the informant and could not do so."

The payment of the \$200.00 contingent fee to the confidential informer 10 days prior to trial in the office of the Special Agents of the United States Government, without serving him with a subpoena to testify as a witness for the government in this case, amounts to telling him to get lost, especially when we take into consideration the statement made by the Assistant United States Attorney in the record on page 372 of the trial transcript, line 12, as follows:

"MR. APPLEBY: When he came in for his reward two weeks ago, the informer was told by the agent he may be subpoenaed by the defense." (Emphasis Supplied) (Exhibit E - T. 372)

#### CONCLUSION

For the foregoing reasons the judgment of conviction against Pasquale Piccirillo should be reversed and the indictment dismissed.

May 20, 1977

Respectfully submitted,

LOUIS A. SOMMA  
Attorney for Appellant



1  
2 Q Had the confidential informer ever indicated to  
3 you that my client had sold weapons in the past?

4 A Yes sir, he did.

5 Q Will you tell us specifically when such  
6 transaction took place?

7 A He just said that he had sold guns previously.

8 Q But he didn't give you a specific date?

9 A No, sir.

10 Q And you weren't interested at that time, you  
11 weren't interested in any past transactions?

12 A No, sir.

13 Q You weren't interested in the <sup>PRE</sup>~~post~~-disposition  
14 of my client as to selling guns as to my client?

15 A I don't understand you.

16 Q Were you interested in my client's  
17 predisposition to sell weapons to you?

18 MR. APPLEBY: I object to the form of the  
19 question, your Honor.

20 THE COURT: I will allow them.

21 MR. APPLEBY: These are legal terms.

22 THE COURT: They may be, but he's a  
23 trained agent.

24 A In what way was I interested in his pre-  
25 disposition?



1 is for sure.

2 MR. SOMMA: I have a further application.

3 I spent las night until a quarter to 3:00 trying  
4 to subpoena a witness that was given to me yesterday.  
5 The Confidential Investigator, Frank Sogliosso.

6 There were people at home, his children were  
7 home and for some reason this confidential informer  
8 did not make himself available.

9 It is my contention that the people, or the  
10 U.S. Government has control of this witness and should  
11 produce him at my request with deliberate speed in as  
12 much as his testimony is essential.

13 THE COURT: Is the confidential informant  
14 currently under the employ of the U.S. Government?

15 MR. APPELBY: No, your Honor.

16 THE COURT: What am I supposed to do?

17 MR. SOMMA: If your Honor would entertain a  
18 request to charge that if the informer is not produced  
19 by the Government, then the charge should be that his  
20 testimony would be adverse to the Government.

21 THE COURT: No, it is quite to the contrary.  
22 Both sides have equal opportunity to obtain his presence  
23 by subpoena.

24 MR. SOMMA: I did spend a goo seven hours trying  
25 to bring him in. I did as much as I could possibly do.



1 THE COURT: Well, you should have, one, obtain  
2 that for prior to yesterday and two, you should have  
3 somebody out looking for him for today.

4 MR. SOMMA: I did request from Mr. Appleby a  
5 month ago, and he refused to give me the information.  
6 I requested it last week and he refused. Yesterday  
7 morning he said, "Let's wait and put it into the record."  
8 Only when we started the trial --

9 THE COURT: You can also come here and make the  
10 application before me. I would have asked you the same  
11 question I did yesterday, is entrapment going to be your  
12 defense. If you said yes, I would have said they should  
13 have given it to you before.

14 MR. SOMMA: Mr. Appleby knew that was my defense.

15 THE COURT: Well, I am here for that purpose. If  
16 you can't get it from him you come before me. I can tell  
17 Mr. Appleby to produce him, but he doesn't have control  
18 over him. The fellow is not under the pay of the  
19 Government. He is still acting as a confidential  
20 informer, is he?

21 MR. APPLEBY: No.

22 THE COURT: How long has he divested himself of  
23 that role?

24 MR. APPLEBY: The last time he was used was in  
25 May 16, 1975.



1 THE COURT: Have you talked with him since?

2 MR. PITTA: Yes.

3 THE COURT: When was the last time you talked to  
4 him?

5 MR. PITTA: Approximately a week and a half.

6 THE COURT: Do you know where he works?

7 MR. PITTA: The only address I have is the one  
8 I gave. He came in for some monetary award.

9 THE COURT: For what?

10 MR. PITTA: For this case.

11 THE COURT: Is he going to testify?

12 MR. APPLEBY: No, your Honor.

13 MR. SOMMA: In light of the testimony right now  
14 Mr. Pitta, he specifically is stating that the confi-  
15 dential informer is available and they know his where-  
16 abouts --

17 THE COURT: He gave you the address, the only  
18 address they have for him. That is what Mr. Pitta  
19 just said. I asked if he knew where he worked and he  
20 said, "No."

21 (The jury entered the courtroom at 10:16 a.m.)

22 THE COURT: We are missing juror number two.  
23 Please check downstairs. We are having Mr. Lee's phone  
24 checked. He lives out in Bayshore to find out where  
25 he is. If he's not here shortly, we will go ahead



1  
2 confidential informer?

3 A Yes, a letter from the New York Police Department  
4 who used them in the past and told me he was a confidential  
5 informant.

6 INTERPRETER: Your Honor, I can't follow him,  
7 he's going to fast.

8 THE COURT: Please slow down.

9 Q Have you been informed the Government may utilize  
10 Frank Sogliosso as a witness?

11 A No.

12 Q Do you think the Government will not utilize  
13 him as a witness?

14 A I have no knowledge of that.

15 MR. APPLEBY: I can tell you he's not going to  
16 be called as a witness.

17 Q Don't you think based on your communications with  
18 Frank Sogliosso that he would be essential as a witness in a  
19 case like this?

20 A No.

21 Q Wouldn't he give you the background information  
22 to establish predisposition?

23 A By the undercover's conversation with the people,  
24 their admissions to him, we proved predisposition by their  
25 conversation, Special Agent Zezima's conversation.



Pitta-cross-Somma

of supply?

A The complete investigation, the dealers,  
everybody.

Q So in effect my clients were not your target?

A Sure they were. Everybody arrested, everybody  
involved is the target of an investigation. Everybody  
involved.

Q Is the confidential informer, Frank Sogliosso,  
available for testimony in this court at present?

A He is no longer an employee of mine and I  
don't know.

MR. APPLEBY: I object.

THE COURT: Overruled.

Q Did you communicate --

A He is no longer an employee of mine of the  
bureau. He does not work for us any more.

MR. SOMMA: I want a yes or no.

THE COURT: No.

The question is do you know whether he is  
available.

THE WITNESS: I don't.

Q When did you last communicate with Frank  
Sogliosso?

A Approximately a week and a half ago.

EXHIBIT C



Pitta-cross-Somma

Q Relate the circumstances surrounding your conversation?

A Yes, Frank Sogliosso called my office and asked if his reward was ready, the money for the case which was \$200. He came to my office, picked the check up and left.

Q Was that the consideration paid for him as confidential informer in this case?

A That was the complete payment for the whole case as a confidential informer.

(Continued on next page.)



Pitta-cross-Somma

1  
2 Q What did he provide for you as a confidential  
3 informer?

4 A For as to people trafficking weapons and a  
5 direct introduction to them.

6 Q Did he state categorically that Mr. Piccirillo  
7 made a transaction with him prior to May 13, 1975? Yes or no.

8 A I never debriefed him that far to find out if  
9 he had bought any guns from him, but to the best of my  
10 recollection it is, no.

11 Q Yet you accepted information from a confidential  
12 informer where the informer did not specify any particular  
13 prior transaction or experience he had with my clients?

14 A He said he was with them, they dealt with guns.  
15 I sent an undercover man with him who dealt the negotiations,  
16 that is all I need.

17 Q That is after you designated Special Agent  
18 Zezima to go to their premise on May 13, 1975, isn't that true?

19 A Absolutely.

20 Q You testified this morning that on the premise  
21 140 McKinnley Avenue, you were there with Special Agent Zezima  
22 on a number of occasions and Special Agent Zezima would  
23 communicate in Italian?

24 A Yes.

25 Q Did you understand some of that?

T 1 pm

R3  
MM/bw



A R N O L D C O L E , called as a witness, having  
been first duly sworn by the Clerk of the Court,  
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. APPLEBY:

Q What is your present employment?

A Special Agent for the Bureau of Alcohol,  
Tobacco and Firearms.

Q How long have you been so employed?

A Approximately two years.

Q Now, you had a communication with Agent Pitt  
is that correct, a few days ago?

A That's correct.

Q And he told you to do something?

A Yes, he did.

Q What did he tell you to do?

A He asked me to try to locate his confidential  
informant.

Q Frank Sagliosa?

A Yes, that's correct.

Q Did he give you an address?

A Yes, he did.

Q Did you go -- strike that.

Could you tell Judge Platt all the efforts you

EXHIBIT D



made to locate this individual?

A Yesterday evening I went to his address, approximately four o'clock, 3:30, to try to locate him. I stayed in the area. I rang the bell. I asked the lady that lived downstairs in his apartment was he in? She said no. This morning I went to the same location, rang both bells. A woman came downstairs who claimed to be his wife and said he wasn't in. I then left the area, called the office to report my status and went back to the location and rang the bell again and he was not there.

Q Did you leave any messages?

A I had left a message to have Frank call John, meaning Agent Pita.

MR. APPLEBY: No further questions.

CROSS-EXAMINATION

BY MR. SOMMA:

Q Mr. Cole, did you have Frank Sagliosa's employment address?

A No, I did not.

Q Is that available to you through the United States Attorney's Office?

A To my knowledge, it is not.

MR. APPLEBY: Your Honor, we do not have his employment address.



1  
2 Q Was yesterday the first day you made an effort  
3 to look for Frank Sagliosa?

4 A Yes, it is.

5 Q Were you instructed to look for him a week ago?

6 A No, I was not.

7 Q Yesterday was the first day that you were  
8 instructed to go looking for him?

9 A Yes.

10 Q You proceeded to 2380 East 14th St., Brooklyn;  
11 is that a fact?

12 A That is a fact.

13 Q Is that a one- or two-family house?

14 A Two-family house.

15 Q Where does Frank Sagliosa live?

16 A He lives in the top floor.

17 Q Did you ring a doorbell?

18 A Yes, I did.

19 Q Did somebody allow you to enter?

20 A No, they did not.

21 Q Did you ring another doorbell of another  
22 apartment?

23 A Yes.

24 Q Were you allowed to enter?

25 A No, I was not.



- 1
- 2 Q This was yesterday afternoon?
- 3 A Yes, it was.
- 4 Q What period of the day was it?
- 5 A Around four o'clock; 3:30.
- 6 Q Were there any children on the premises?
- 7 A No, there wasn't.
- 8 Q This morning, when you went to the premises
- 9 again, what time was it?
- 10 A Approximately 8:30, quarter to nine.
- 11 Q Do you know if Frank Sagliosa has any children?
- 12 A No, I do not.
- 13 Q Did you see a 16-year-old girl there?
- 14 A No, I did not.
- 15 Q At 8:30, a quarter to nine, did you see an
- 16 11-year-old boy leaving for school?
- 17 A No, I did not.
- 18 Q Did you try to gain entry into that apartment?
- 19 A No, I did not try to gain entry.
- 20 Q Did you ring a doorbell on the ground floor?
- 21 A Yes, I did.
- 22 Q Did anybody answer?
- 23 A Yes.
- 24 Q What did he say to you and you say to him?
- 25 A It was a she. I asked if Frank Sagliosa lived



1 there. She said upstairs. I rang the bell, which I did.

2 Q Did you proceed up the steps after you gained  
3 entry into the main entrance?  
4

5 A I didn't gain entry at all. That was a stairway,  
6 a storm door, a screen door on the outside.

7 Q After the door was opened, did you go into the  
8 premises to look for Frank Sagliosa?

9 A I did not enter the premises.

10 Q Did you notice there was no door on the top  
11 staircase?

12 A I did not look up the stairway at all.

13 Q Did you notice there was no other door that  
14 would prevent you from seeing if Frank was on the premises?

15 A No, I did not.

16 MR. SOMMA: No further questions.

17 MR. APPLEBY: No further questions.

18 Apparently, Mr. Somma knows the informants  
19 better than I do.

20 MR. SOMMA: Yes, I have been on the premises  
21 many times.

22 THE COURT: I don't want to hear the steps  
23 taken. He has taken an oath.

24 You may step down.

25 MR. APPLEBY: Your Honor --



1 Government with further cost.

2 MR. SOMMA: I renew my request to the U. S.  
3 attorney to produce the confidential informer.

4 THE COURT: He says he doesn't have control of  
5 him. They have to do the same thing you have to  
6 do, subpoena him here.

7 MR. SOMMA: They refused to subpoena him.

8 THE COURT: They are under no obligation to  
9 subpoena him. They present their case. They have  
10 given you his whereabouts and address and all the  
11 information they have.

12 MR. APPLEBY: When he came in for his reward  
13 two weeks ago, the informer was told by the agent he  
14 may be subpoenaed by the defense.

15 MR. SOMMA: Based on that representation, I can  
16 understand why I spent seven hours the other night  
17 trying to serve him with a subpoena, and I had an  
18 investigator there trying to serve him.

19 THE COURT: Well, he is hiding. How is the  
20 Government going to produce him?

21 MR. APPLEBY: The agent called the ATF office  
22 and told them the informer comes in contact with the  
23 ATF office, he should be made aware he may be called  
24 as a witness in my office.

25 MR. SOMMA: Is it your position this informer

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EAST. DIST. N. Y.

*James Bracco*